IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CIVIL WRIT PETITION NO.19496 of 2006

Date of Decision: April 3 , 2007

M/s Jamba Exports Jalandhar

.....PETITIONER

VERSUS

Commissioner of Customs and another

.....RESPONDENT

CORAM: HON'BLE MR.JUSTICE M.M.KUMAR
HON'BLE MR.JUSTICE RAJESH BINDAL

Present: Mr.Jagmohan Bansal, Advocate
for the petitioner.

Mr.Kamal Sehgal, Advocate
for the respondents.

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This petition filed under Article 226 of the Constitution of India prays for quashing of final order dated 22.9.2006 (Annexure P-3) passed by Customs and Central Excise Settlement Commission, New Delhi- respondent No.2, rejecting the application of the petitioner under Section 127-B (1) of the Customs Act 1962, in which prayer was made for settlement in respect of show cause notice dated 6.10.2005 issued by the Commissioner of Customs, the Mall, Amritsar- respondent No.1.

Brief facts of the case , necessary for disposal of the petition, are that the petitioner is a proprietorship concern with its Head Office at

Jalandhar and is engaged in the trading of hand tools falling under chapter heading 73 of the Schedule to Central Excise Tarrif Act 1985. According to the assertion made by the petitioner, it exported hand tools in the month of March 2000 under shipping bill No.2277, claiming benefit of Duty Entitlement Pass Book Scheme (DEPB). It may be pointed out that DEPB is an incentive scheme which entitles an exporter to claim credit on the basis of this scheme at a predetermined rate. The revenue w.e.f. 1.4.2000 imposed value cap of Rs.70 per kg. in respect of hand tools exported under DEPB scheme as the goods exported by the petitioner were actually exported on 5.4.2000, but date of export on shipping bill was mentioned as 31.3.2000. The dispute had arisen as to whether the petitioner is to be assessed on the basis of cap of Rs.70 per kg., imposed w.e.f. 1.4.2000 or it is entitled to the whole benefit of DEPB scheme, as it was existing up to 31.3.2000. The petitioner had in fact availed the benefit on the basis of deduction made in the bill of shipping on the assumption that he had exported the goods on 31.3.2000 and had availed the benefit of Rs.4,62,889/-.

On 6.10.2005, Respondent No.1 i.e. Commissioner of Customs issued a show cause notice (Annexure P-1) calling upon the petitioner to show cause as to why the goods exported by it should not be confiscated and as the goods have already been exported, redemption fine should not be imposed and why penalty under Section 114 of the Act should not be imposed.

The allegations levelled against the petitioner are that there was intelligence opinion that number of exporters have fraudulently availed higher benefit of DEPB scheme by managing to pet ante-dated Customs Examination report. It was further alleged that the petitioner had manipulated the examination reports by ante-dating the same with the intention to avail disproportionately higher benefit and therefore, had contravened the provisions of sub Rules (1) and (2) of Rule 14 of the Foreign Trade (Regulation) Rules, 1993 and have thus rendered the export as illegal in terms of Section 11 H(a) provided under Chapter IVB of the Customs Act 1962 and, therefore, the goods exported under the shipping bill No.2277 dated 31.3.2000 valued at Rs.26,02,394/-are liable for confiscation under Section 113 (d) of the Act. As the goods have already been exported out of the country, therefore, redemption fine is imposable under Section 125 of the Act, in lieu of confiscation and also the petitioners have rendered themselves liable for penal action under Section 114 of the Act.

The petitioner, in terms of Chapter XIVA of the Act, filed an application to finally settle his duty liability in respect of DEPB before the Settlement Commission (respondent No.2), which has been rejected by the impugned order dated 22.9.2006 (Annexure P-3) and the operative part of the order reads as under:-

> "On a query as to how could the application be admissible under Section 127-B (1) of the Act read with the first proviso thereto and the definition of the 'Case' in Clause (b) under

Section 127-A of the Act, the Advocate for the applicant pleaded that at the stage of redemption fine as proposed in the SCN, the duty liability would also arise and a party filing shipping bills is also entitled to apply for settlement.

The Bench has examined the matter along with relevant records and submissions of the two sides. The SCN in this case only proposes confiscation of the goods with an attendant redemption fine in lieu of confiscation and penal action. It does not propose any demand of customs duty from the applicant. Under Section 127-B (1) any importer/exporter or any other person may, at any stage of the case relating to him, make an application for settlement in the prescribed manner containing a full and true disclosure of his duty liability which had not been disclosed before the proper officer. Such an application can only be made in respect of a 'Case'. The word 'Case' is defined under Section 127-A(b) of the Act to mean any proceeding under the Customs Act or any other Act 'for levy, assessment and collection of customs duty, or any proceeding by way of appeal or revision in connection with such levy, assessment or collection'. The SCN in this case does not involve any proceedings for the levy, assessment and collection of customs duty. It does not propose any demand of customs duty from the applicant to speak nothing of any such amount being an excess of Rs.2.00 lakhs. Therefore, the conditions for the admission as laid down under Section 127-

B(1) are not fulfilled in this case.

Accordingly, in exercise of its power under Section 127-C(1) of the Act, the Commission rejects the application."

The petitioner has claimed that the application filed by Sh.Harvinder Singh Sidhu, after the receipt of show cause notice dated 12.1.2006, issued by Additional Commissioner, Customs, Amritsar, has been admitted.

In the reply filed by the respondents, it has been asserted that the goods were brought at CFS, (OWPL), Ludhiana after 1.4.2000. The goods were examined and stuffed in container on 4.4.2000 and the container left CFS, (OWPL), Ludhiana on 5.4.2000. The Manager of CFS (OWPL), Ludhiana had stated before the department that the goods had reached CFS (OWPL), Ludhiana for the first time on 4.4.2000. The Area Manager of the concerned Shipping Line had also stated that the Bill of Lading relating to impugned shipping bill was issued on 5.4.2000 and it was ante-dated for 31.3.2000 on the direction of the exporter. The allegations, that on account of rush of work the goods were not cleared on 31.3.2000, have been denied by asserting that the goods were received in the warehouse of CFS (OWPL), Ludhiana on 4.4.2000 only. It is also claimed that disciplinary proceedings against the Customs Officer, involved in ante-dating the export documents, have already been initiated. The date of arrival of goods at CFS is distinct from the date of export because the goods are allowed for export as per Section 51 of the Act only after 'Let Export Order' and not before

that . In the present case, the 'Let Export Order' was given on 5.4.2000 and not on 31.3.2000. Therefore, it has been submitted that the value cap, as on the date of export, has to be kept in view and the incentive available to the petitioner was Rs.1,22,594/- and not Rs.4,62,889/- as was availed. It has also been asserted that the present case is not covered by the inclusive definition of expression 'Case' as used under Section 127A (b) of the Act, which may be within the purview of the Settlement Commission and has been rightly rejected.

We have heard Mr.Jagmohan Bansal, learned counsel for the petitioner and Mr.Kamal Sehgal, learned counsel for the respondents.

Mr. Bansal has submitted that the Settlement Commission-respondent No.2 enjoys wide jurisdiction to entertain all kinds of settlement claim applications, depending upon the nature and the circumstances of the case. In that regard he has placed reliance on the Division Bench judgment of Bombay High Court in the case of **Tata Teleservices (Maharashtra) Limited vs. Union of India 2006 (201) E.L.T. 529 (Bombay).** He has argued that the expression 'Case', used under Section 127A (b), has been interpreted by the Division Bench to mean that only the cases of mis-classification of all such similar cases including the wilful misclassification, wherein notice under Section 28 of the Act has been issued, could be entertained by the Settlement Commission and the Settlement Commission has no jurisdiction in other cases. He has further argued that there is difference in procedure for moving application under the Income Tax Act. The application was required to be filed before any investigation is

undertaken or any show cause notice is issued, whereas under the Customs Act, an application could be filed only after the show cause notice is issued which may even pertain to confiscation and containing allegation of commission of fraud or smuggling or deliberate mis-declaration. In that regard, he has placed reliance on para 43 of the Division Bench judgment in **Tata Tele Services (Maharashtra) Limited's case (supra)**.

Mr.Kamal Sehgal, learned counsel for the respondents, has submitted that under Section 127A (b) of the Act, the Settlement Commission has a limited power and cannot entertain an application where no dispute concerning payment of duty is pending. According to the learned counsel, in the present case, the duty in fact had already been paid by availing manifold benefits of DEPB scheme by ante-dating the bill of shipping, whereas in fact the export was made on 4.4.2000 or 5.4.2000.

We have heard learned counsel for the parties at a considerable length and find merit in the contentions raised by the counsel for the petitioner. It would be necessary to make a reference to the provisions of Section 127B of the Act, which reads as under:-

> 127B. Application for settlement of cases:-
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> (1) Any importer, exporter or any person (hereinafter in this chapter referred to as the applicant) may, at any stage of a case relating to him, make an application in such form and in such manner as may be specified by rules, and containing, a full and true disclosure of his duty liability which has not been

disclosed before the proper officer, the manner in which such liability has been incurred, the additional amount of customs duty accepted to be payable by him and such other particulars as may be specified by rules including the particulars of such dutiable goods in respect of which he admits short levy on account of misclassification or otherwise of goods, to the Settlement Commission to have the case settled and such application shall be disposed of in the manner hereinafter provided:

Provided that no such application shall be made unless -

(a) The applicant has filed a bill of entry, or a shipping bill, in respect of import or export of goods, (as the case may be and in relation to such bill of entry or shipping bill), a show cause notice has been issued to him by the proper officer.

(b) The additional amount of duty accepted by the applicant in his application exceeds two-lakh rupees.

Provided further that no application shall be entertained by the Settlement Commission under this sub-section in cases which are pending in the Appellate Tribunal or any Court:

Provided also that no application under this sub-section

shall be made in relation to goods to which section 123 applies or to goods in relation to which any offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) has been committed:

Provided also that no application under this sub-section shall be made for the interpretation of the classification of the goods under the Customs Tarrif Act, 1975 (51 of 1975).

(2) Where any dutiable goods, books of account, other documents or any sale proceeds of the goods have been seized under Section 110, the applicant shall not be entitled to make an application under sub-section (1) before the expiry of one hundred and eighty days from the date of the seizure.

(3) Every application made under sub-section (1) shall be accompanied by such fees as may be specified by rules.

(4) An application made under sub-section (1) shall not be allowed to be withdrawn by the applicant.

The provisions of the Section show that any importer or exporter, at any stage of a case relating to him, may move an application after a full and true disclosure of his duty liability which has not been disclosed before the proper officer. It is further required to be disclosed the manner, in

which, such liability has been incurred and the additional amount of customs duty accepted to be payable by the applicant. The application is prohibited where bill of entry of a shipping bill in respect of import or export of goods or a show cause notice has not been issued to him by the proper officer, the amount of duty accepted by the applicant is to exceed Rs. Two lacs, apart from certain other exceptions. In the present case all the requirements are fulfilled by the petitioner as is evident from perusal of his application filed before the Settlement Commission on 4.5.2006 (Annexure P-2). In para 12 of the application, the petitioner has disclosed additional amount of duty, which is accepted to be payable, amounting to Rs.3,40,295/-, shipping bill had already been furnished and the petitioner is obviously an exporter. In support of the aforementioned view, he placed reliance on paras 39 and 46 of the Division Bench judgment in **Tata Teleservices (Maharashtra) Limited's case (supra)**.

We are further of the view that the Settlement Commission has the jurisdiction to entertain all kinds of applications and after scrutiny, it may or may not entertain the same. It is one thing to say that the Settlement Commission does not have the jurisdiction at all to look at the claim, which is not pertaining to short levy, due to misclassification or otherwise. Whereas, it is quite another thing to say that Settlement Commission has jurisdiction to entertain all kinds of applications but it may reject the same even at the preliminary stage. Therefore, we find the value of provisions of Section 127B of the Act. The settlement Commission has ample jurisdiction to entertain the claim and opine on the same in one way or the

other.

For the reasons aforementioned, this petition succeeds. The order dated 22.9.2006 passed by the Settlement Commission (Annexure P-3) is set aside. The matter is remanded back to the Settlement Commission (respondent No.2) to entertain the application of the petitioner and decide the same on merit as the matter has been pending. We would appreciate if the application is decided expeditiously, preferably within a period of three months from the date of receipt of certified copy of this order.

(M.M.KUMAR)
JUDGE

(RAJESH BINDAL)
JUDGE

April 3,2007
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